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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ESPARZA, Defendant and Appellant.	B215446 (Los Angeles County Super. Ct. No. BA301489)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charlaine F. Olmedo, Judge. Affirmed.

Cynthia Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Dawn S. Mortazavi, Deputy Attorneys General, for Plaintiff and Respondent.

Carlos Esparza appeals from the judgment entered following his negotiated no contest plea to criminal threats (Pen. Code, § 422)[1] and possession of a weapon by an inmate (§ 4502). He was sentenced to 11 years in prison. He contends that his section 422 conviction is not subject to the sentencing provisions of section 1170.1, subdivision (c). In addition to refuting appellant's substantive claims, respondent argues that appellant's claims should be dismissed for his failure to obtain a certificate of probable cause.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In August 2005, Deputy District Attorney Mark Debbaudt received a letter threatening his life and the life of Judge Ronald Coen upon appellant's release from prison. The letter was signed by appellant and the return address contained appellant's name and California Department of Corrections number, along with the address of the Calapatria State Prison. In the letter, appellant requested that Deputy District Attorney Debbaudt show the letter to Judge Coen; Mr. Debbaudt showed the letter to Judge Coen. At the time, appellant was a serving a sentence for attempted murder.

On January 20, 2009, appellant negotiated a plea under which he pled no contest to one count of criminal threats under section 422 and one count of possession of a weapon by an inmate under section 4502 stemming from a separate incident. Appellant further admitted that he suffered a prior serious felony conviction for the purposes of the Three Strikes law (§§1170.12, subds. (a)-(d); 667 subds. (b)-(i)) and under section 667, subdivision (a)(1).

Under the plea agreement, appellant would be sentenced to consecutive terms for the two current offenses, those terms to be served consecutively to the sentence for attempted murder. Appellant's sentence would be 11 years if the section 422 violation came within the ambit of section 1170.1, subdivision (c), and eight years four months, if

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[1] All further statutory references are to the Penal Code.

it did not.[2] The plea bargain reserved for the trial court's determination the issue of the applicability of section 1170.1, subdivision (c), and stipulated that the defendant could not appeal the imposition of consecutive sentences. The trial court found appellant's section 422 threat to fall within the ambit of section 1170.1, subdivision (c), and sentenced appellant to a total of 11 years in state prison.

DISCUSSION

I. Appellant's Failure to Obtain a Certificate of Probable Cause Does Not Bar Appellant's Appeal

Respondent contends that appellant's notice of appeal is not cognizable because he did not obtain a certificate of probable cause. This contention lacks merit.

California Rules of Court, rule 8.304(b) sets the relevant requirements for appealing a superior court judgment after a plea of nolo contendere, specifically that: "(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere . . . the defendant must file in that superior court . . . the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] . . . [¶] (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: (A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or (B) Grounds that arose after entry of the plea and do not affect the plea's validity."

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[2] Appellant was convicted of violating section 422 in count 3 and violating section 4502, subdivision (a) in count 7.

The 11-year term included a full-term sentence for the section 422 violation and was calculated as follows: count 3: two-year midterm, doubled under the Three Strikes law, for four years; count 7: one-third the midterm of three years, or one year, doubled under the Three Strikes law, for two years; and five years for the prior serious felony conviction, for a total of 11 years.

The eight-year four-month term included subordinate one-third the midterm sentences for both of the current offenses, calculated as follows: count 3: one-third the midterm of two years, or eight months, doubled under the Three Strikes law, or 16 months; count 7: one-third the midterm of three years, or one year, doubled under the Three Strikes law, for two years; and five years for the prior serious felony conviction, for a total of eight years four months.

Section 1237.5 requires defendants to obtain a certificate of probable cause from the trial court upon appeal of a guilty plea. Appellate courts must strictly apply section 1237.5. (*People v. Hodges* (2009) 174 Cal. App. 4th 1096, 1104-1105, citing *People v. Mendez* (1999), 19 Cal.4th 1084, 1098.) However, under rule 8.304(b)(4)(B) of the California Rules of Court, a certificate of probable cause is not required when the appeal does not challenge the guilty plea's validity. (*People v. Shelton* (2006), 37 Cal.4th 759, 766.) The central question is "whether defendant 'seeks only to raise [an] issue[] reserved by the plea agreement, and as to which he did not expressly waive the right to appeal.'" (*People v. Cuevas* (2008) 44 Cal.4th 374, 381, citing *People v. Buttram* (2003) 30 Cal.4th 773, 787.) Thus, an appeal that challenges the trial court's discretion to impose a specified maximum sentence does not necessarily require a certificate of probable cause. (See *People v. Shelton*, *supra*, 37 Cal.4th at p. 763.)

Here, appellant was not required to file a certificate of probable cause. Appellant's plea bargain reserved the determination of whether section 422 fell within section 1170.1, subdivision (c) at the time of sentencing by the trial court. On appeal, appellant disputes the applicability of section 422 under section 1170.1, subdivision (c), which affects the length of the prison term. If the trial court correctly found section 422 to fall within the ambit of section 1170.1, appellant's sentence is 11 years; if the trial court correctly found to the contrary, his sentence is eight years four months. Appellant's appeal does not affect the validity of his guilty plea, but only disputes the trial court's determination reserved under the plea bargain, and thus in determining the length of his sentence. Appellant was therefore not required to obtain a certificate of probable cause for this appeal.

II. The Trial Court Properly Found Section 1170.1, Subdivision (c) to Be Applicable

Appellant contends that the trial court erred by sentencing him to state prison for 11 years because section 422 did not fall within the ambit of section 1170.1, subdivision (c). This claim is without merit.

Section 1170.1, subdivision (c) provides: "(c) In the case of any person convicted of one or more felonies committed while the person is confined in a state prison . . . and

the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a). This subdivision shall be applicable in cases of convictions of more than one offense in the same or different proceedings."

When interpreting statutes, "[t]he language is construed in the context of the statute as a whole and the overall statutory scheme . . ." and significance is given "'to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.'" (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) The legislative intent of section 1170.1 is to punish in-prison crimes more severely than those committed outside prison. (*People v. White* (1988) 202 Cal. App. 3d 862, 869.) Appellant makes two interpretational arguments regarding the applicability of sentencing guidelines of section 1170.1, subdivision (c) to threats made in prison under section 422.

Appellant argues that the criminal threats violation under section 422 does not fall within the ambit of section 1170.1, subdivision (c), because section 422 does not enumerate a specific sentencing scheme for in-prison threats, unlike sections 4500 to 4505, which require the offenses to be in-prison and enumerate sentencing schemes. However, section 1170.1, subdivision (c) is not limited to offenses defined in sections 4500 to 4505. In *People v. Nick* (1985) 164 Cal.App.3d 141, 146, the First Appellate District held that a robbery offense as defined under section 211, which does not enumerate a specific sentencing scheme for in-prison threats, could be sentenced under section 1170.1, subdivision (c). Similarly, the Fifth Appellate District noted that a robbery offense could fall within the ambit of section 1170.1, subdivision (c). (*People v. Logsdon* (1987) 191 Cal.App.3d 338, 340, 344.) It would be consistent with precedent to hold that section 422 falls within the ambit of section 1170.1, subdivision (c).

The legislative intent of section 1170.1 is to provide enhanced sentences to criminals who commit crimes while incarcerated in prison; subdivision (c) does not

define any new, substantive crime. Section 1170.1, subdivision (c) applies to all felonies "committed while the *person* is confined in state prison . . . ." (Italics added.) By considering the legislative intent and by giving each word significance in pursuance of the legislative intent, we find that appellant was properly sentenced under section 1170.1, subdivision (c) when he threatened his victims under section 422.

Appellant also argues that the criminal threat was not completed in prison because the elements of a threat are not satisfied until the threat is received and read by the recipient. Because the victims received and read the written threat outside of prison, appellant argues that the elements of the offense were not completed "in a state prison" as defined under section 1170.1, subdivision (c).

Here, it is irrelevant that some elements of a section 422 written threat were completed outside of prison. Section 1170.1, subdivision (c) only requires that the *person* be confined in state prison while the offense is committed; it does not require that the offense itself be completed in prison. This interpretation is consistent with the legislative intent to punish in-prison offenses and with a plain-meaning reading of the statutory text. (*People v. White*, *supra*, 202 Cal.App.3d at 869; *People v. Canty*, *supra*, 32 Cal.4th at p. 1276.)

We conclude that the trial court properly determined that the section 422 offense came within the ambit of section 1170.1, subdivision (c). The 11-year sentence was properly imposed.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J. CHAVEZ, J.